GOLDEN CENTURY DEVELOPMENT SDN. BHD. & ANOR. v. GANHOE & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Abdul Hamid F.JJ.) March 9 & October 7, 1982]

[Johore Bahru – Federal Court Civil Appeal No. 285 of 1980]

Practice and Procedure – Applying to set aside writ of summons and statement of claim as they disclose no reasonable cause of action – Affidavits filed in support of application – Affidavits inadmissible – Claim not obviously unsustainable – Application dismissed – R.H.C. 1980, O.18, r.19(2).

In this case the first respondent alleged that the first appellant had agreed to sell to him a piece of land together with a house to be erected thereon and he had agreed to pay for the land and house. He had assigned his rights under the contract to the second respondent and notice of assignment had been sent and accepted by the first appellant. It was alleged that in breach of the agreement, the first appellant sold the land and house to the second appellant. The respondents brought an action against the appellants. The appellants alleged that there had been no formal agreement and no written agreement had been signed. The appellants applied for the writ of summons and statement of claim to be set aside as they disclosed no reasonable cause of action. The application was dismissed in the High Court and the appellants appealed.

Held: the summary procedure under Order 18 rule 19 can only be adopted where it is clearly seen that a claim or answer is on the face of it obviously unsustainable. In this case the claim did not appear to be obviously unsustainable and therefore the application was rightly dismissed.

Cases referred to:

(1) *Yeo Long Seng* v. *Lucky Park (Pte.) Ltd.* [1971] 1 M.L.J. 21.
(2) *Rajeswari Thedshanamurthy* v. *Kin Nam Realty Development Sdn. Bhd.* [1983] 1 M.L.J. 88.
(3) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor* [1981] 1 M.L.J. 56.
(4) *A.G. of Duchy of Lancaster* v. *L. & N.W. Railway Co.* [1892] 3 Ch. 274.

[The following cases were also referred to in argument: *Yap Eng Thong & Anor* v. *Faber Union Ltd.* [1973] 1 M.L.J. 191; *Koh Peng Moh* v. *Yahiya* [1965] 1 M.L.J. 230; *Sing Lian Express Sdn. Bhd.* v. *Soh Kim Tee* [1974] 2 M.L.J. 24; *Skyline Trading Co.* v. *Tiow Yoke Lan* [1969] 2 M.L.J. 212]

FEDERAL COURT.

P.K. Nathan for the appellants.

N. Jegathesan for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The appellants, who were defendants in the court below, had applied by way of Summons-in-Chambers for an order "that the Writ of Summons and the Statement of Claim and the service thereof and all subsequent proceedings be set aside as these disclose no reasonable cause of action" (obviously under O.18 r.19 of the Rules of the High Court 1980).

Appellants had filed two affidavits as well as various documents in support of their application. Counsel for the respondents/plaintiffs very properly objected to the admissibility of such evidence for the purposes of this application in view of the express prohibition contained in O.18 r.19(2), and the learned Judge accordingly proceeded to consider the application without regard for such evidence. Since Mr. Nathan for the appellants conceded that the affidavits and documents are indeed inadmissible, we need not dwell any further on this aspect of the application.

In their writ and statement of claim the respondents alleged that on or about October 9, 1978 the 1st respondent had agreed to purchase and the 1st appellant had agreed to sell to him a piece of land together with a house to be erected thereon for $55,000.

In paragraph 2 of the Statement of Claim it was further alleged that the land to be sold under the agreement was in Johore Bahru, 1430 sq. feet in area and held under H.S.(D) 19309 for Lot TLO No.10463, and that 1st appellant was to erect on it a double storey terraced house in accordance with the Housing Developers Rules 1970, and with the specifications contained in a brochure prepared by the 1st appellant and given or shown to the 1st respondent.

In paragraph 3 respondents claim that the purchase price (presumably progress payments) would be paid by 1st respondent to 1st appellant in accordance with the Schedule of Payments contained in the brochure aforementioned.

The 1st respondent then according to the Statement of Claim paid 1st appellant the sum of $1000 as deposit and part payment, for which a receipt was issued dated October 9, 1978. 1st respondent then assigned to 2nd respondent all her interest in the property in writing for $2000, on November 4, 1978 and gave notice of the assignment to 1st appellant on or about December 28, 1978.

Having consented to the assignment, the 1st appellant then sent to 2nd respondent's solicitors 3 sets of a formal agreement to be executed by the former, which respondents alleged contained terms which were in breach of the Housing Developers Rules 1970, and were in addition inconsistent with the terms of the agreement allegedly concluded on October 9, 1978 (referred to in paragraph 4 of the Statement of Claim) some of which were particularly enumerated by the learned Judge, viz:

(a) power given to 1st defendant to increase the price unilaterally;

(b) requirement for 1st plaintiff to pay for improvement of river, Sungei Sengkuang;

(c) power given to 1st defendant to terminate the agreement by returning all sums of money received;

(d) requirement for the plaintiff to pay for costs of electricity, water and sewerage connections outside the house; and many others.

The 2nd respondent's solicitors wrote to 1st appellant to amend the draft agreement to conform with the Housing Developers Rules and to the agreement of October 9, 1978, but instead on March 26, 1980, 1st appellant wrote to the former repudiating the agreement (para. 10 of Statement of Claim), presumably referring to the alleged agreement of October 9, 1978 on the ground that he did not agree with the amendments proposed by 2nd respondent.

On July 9, 1979, and unknown to respondents, it was alleged that 1st appellant conveyed the land to 2nd appellant. Respondents claim that 2nd appellant had knowledge and is bound by the agreement of October 9, 1978, and alternatively that this transfer was fraudulent.

In passing we should mention that four similar actions wherein similar question of law and fact are involved have with the concurrence of the respective plaintiffs been consolidated under Order 4 with this suit.

In the court below, it was urged on behalf of the present appellants that paragraph 7 and 8 of the Statement of Claim show that the respondents had refused to complete the agreement, and that paragraph 14 merely indicated that they were ready and willing to sign the agreement, but there was neither a written nor an oral one. In short there was no formal agreement as is required by Rule 12 of the Housing Developers (Control and Licensing) Rules 1970.

The learned Judge considered Rule 10(3) of the Rules abovementioned and said:—

> "Where, as in this case, the plaintiff has paid his deposit towards the purchase of the accommodation, accompanied with the draft agreement shown to the plaintiff, the rule imposes an irrevocable option to the plaintiff giving him the right to purchase. This, in itself, in my view, gives rise to a legally binding contract between the parties, although the terms have yet to be agreed and to be evidenced in writing as required under Rule 12(1) of the Rules."

His Lordship cited the Singapore decision *Yeo Long Seng* v. *Lucky Park (Pte.) Ltd.*[1] with approval and dismissed the application.

Mr. Nathan, for the appellants says that *Yeo Long Seng's* case should be distinguished from the present appeal. There the successful plaintiff, apart from paying the deposit had been asked to sign a letter addressed to the defendants which contained the terms of the instalment payments to be made to the latter, and which concluded with the following paragraph:—

> "I hereby agree to sign the agreement within 14 days on receipt of the vendor's notice for signing the same; failing which the vendor is entitled to cancel the booking and recall the property . . .".

In the present appeal, he points out, nowhere has the purchaser signed a document committing himself to purchase.

We were also referred to two other decisions, *Rajeswari Thedshanamurthy* v. *Kin Nam Realty Development Sdn. Bhd.*[2] and *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.*[3], in which the respective plaintiffs had succeeded in their action only because they had signed documents which were held to be firm contracts, a factor which does not exist in the present action.

A number of similar decisions were also cited to which we need not refer.

We think it will suffice for us to refer to the well known authority *A.G. of Duchy of Lancaster v. L. & N.W. Railway Co.*[4] in which it was held that the summary procedure under the English rule which is identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". On the face of the claim before us, we are unprepared to say that it is obviously so.

Accordingly we dismiss this appeal with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Nathan & Yang; John Ang & Co.*